

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING
EN BANC**

77-1308

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1308

UNITED STATES OF AMERICA,

—v.—

EUGENE COREY,

Defendant-Appellant.

B
P/S
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES FOR REHEARING

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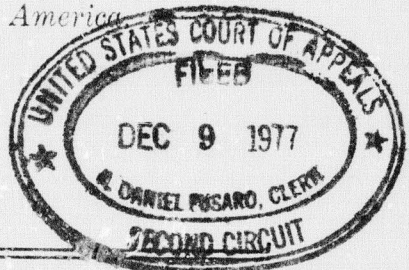




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Docket No. 77-1308

UNITED STATES OF AMERICA,

Appellee,

—v.—

EUGENE COREY,

Defendant-Appellant.

PETITION OF THE UNITED STATES FOR REHEARING

Preliminary Statement

The United States of America respectfully petitions for rehearing of certain portions of the opinion of the Court, Dkt. No. 77-1308, slip op. 585, filed on November 30, 1977, affirming the judgment of the District Court.

Statement of the Case

Eugene Corey was convicted after trial before the Honorable Constance Baker Motley of three counts charging him with mail fraud, wire fraud, and conspiracy in violation of Title 18, United States Code, Sections 1341, 1343, and 371. In very brief fashion, the evidence against him consisted in large part of the testimony of accomplices who had engaged with Corey in a kick-back scheme whereby from 1965 through 1976 the accomplices would grossly over-bill Hartz Mountain (Corey's employer) for payment of supplies; Corey, the vice-president

in charge of data-processing, would then sign the fraudulent vouchers submitted by the accomplices; and a portion of the ill-gotten excess would then be passed on to Corey. This testimony was corroborated by documentary evidence detailing the fact and the extent of the overbilling, and, in part, Corey's receipt of the kickbacks.

Corey testified in his own behalf. He did not contest the falsity of the numerous vouchers and invoices he had signed; indeed, in summation his attorney acknowledged that Hartz Mountain paid for far more supplies than it had received. (Tr. 592).^{*} Rather, Corey's sole claim was that he did not know that the vouchers and invoices were false, and that he had signed them in reliance upon his subordinates at Hartz. (See, e.g., Tr. 388-89). On cross-examination of Corey, the Government was allowed to elicit from Corey that in 1960, at a position he had held at CBS, Inc., immediately prior to moving to Hartz, he had falsified his overtime and also falsified his employee tax form ("W-2") by removing his salary card from the computer. (Tr. 478).

On appeal, Corey's principal attack was on the correctness of the District Court's ruling on the CBS matter. Corey asserted, *inter alia*, that the CBS events were insufficiently similar to the charges in the indictment to permit their admission as a "similar act" under F.R.Evid. 404(b). This Court affirmed. Noting that the test was whether "the probative value of such evidence outweighs the potential for prejudice against the defendant," slip op. at 588, the Court found that there was only "some similarity in method." The Court then stated that "the fact that Corey may have deliberately falsified his own overtime hardly proves that he had the knowledge or intent to falsify purchases of supplies by Hartz Mountain from third parties." *Id.* The Court concluded that

^{*} Citations to "Tr." refer to the trial transcript.

"assuming error in the admission of the testimony, we hold that the error was harmless."

Reasons for this Petition

The Government is taking the relatively unusual but not unprecedented * step of seeking rehearing of an opinion affirming a conviction for two principal reasons. First, the panel has incorrectly and unnecessarily modified the standard determining the admissibility of similar act evidence. Second, by casting doubt in this case upon the similarity of the prior conduct to the conduct alleged in the indictment, the Court has spoken entirely inconsistently with specific, directly controlling decisions of the Court. Particularly given the importance of and the need for guidance on the similar act issue, which has recurred repeatedly in recent years, we respectfully submit that some of the language in the Court's opinion should be reconsidered and modified.

A R G U M E N T

The District Court's Decision to Admit Similar Act Evidence Was Not Error, Even Harmless Error.

Preliminarily, by stating the governing test to be whether "the probative value of such evidence outweighs the potential for prejudice against the defendant," slip op. at 588, the Court needlessly misstated the proper standard. Rule 403 expressly states that relevant evidence, which is declared admissible by Rule 402, "may be excluded if its probative value is *substantially* out-

* This Court has on at least three recent occasions modified, on petition by the Government, an opinion affirming a conviction or otherwise ruling for the Government. *United States v. Jarvis*, 560 F.2d 494 (2d Cir. 1977), as amended by order dated October 19, 1977; *United States v. Cannone*, 528 F.2d 296 (2d Cir. 1975); *United States v. Pucio*, 476 F.2d 1099, 1106 (2d Cir.), cert. denied, 414 U.S. 844 (1972).

weighed" by the danger of "unfair prejudice to the defendant. (Emphasis added).^{*} The entire Court has recently emphasized that this Rule imparts a considerable measure of discretion to the trial judge, whose determination—even if different from that which the reviewing court would reach on its own—will not be reviewed unless the decision is "arbitrary" or "irrational". *United States v. Robinson*, 560 F.2d 507, 515-16 (2d Cir. 1977) (en banc). Particularly since this Court has repeatedly adopted, in the context of similar acts, the original Rule 403 formulation that the danger of unfair prejudice must "substantially outweigh" the probative value, see, e.g., *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir.), cert. denied, 429 U.S. 983 (1976); *United States v. Magnano*, 543 F.2d 451, 455 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977),^{**} the Court's inversion of that standard to state that the probative value must outweigh the danger of prejudice is unwise and incorrect.^{***}

^{*} The Advisory Committee has noted that "unfair" prejudice results from evidence having "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Judge Weinstein has noted that such "unfair prejudice" generally "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action . . ." 1 Weinstein, *Evidence*, ¶ 403[03], at 403-15-16 (1975) (footnotes omitted). As indicated at p. 9, *infra*, the evidence in this case surely had no such characteristics.

^{**} In *Magnano*, the Court noted the similar act evidence must be "of such a highly prejudicial nature as to *overwhelm* its probative value." (Emphasis added).

^{***} Nor is the matter simply one of semantics. The formulation adopted by the panel appears to suggest that the proffered evidence is presumptively inadmissible unless the preponderance of probative value over prejudicial danger is first established. Such a view of the admissibility of evidence, however, is entirely inconsistent with the structure of the Rules of Evidence. Rule 402 flatly rules all relevant evidence—as broadly defined in Rule 401 as evidence having "any tendency" to render a fact more or less probable—to be admissible, subject only to the discretion of the judge under Rule 403, who "may" preclude evidence if the danger "substantially outweighs" the value.

More particularly, the panel's opinion grossly understates the remarkably close parallel between the prior similar act and those with which Corey was charged. While the opinion grudgingly notes "some similarity in method," it then indicates that the similar act evidence "hardly prove[d]" Corey's knowledge and intent. Aside from the question whether any evidence must "prove" an ultimate fact at trial in order to be admissible, as opposed to merely have "any tendency" to prove it,* the panel's appraisal of the similar act evidence is misconceived. At CBS, Corey designed a scheme to defraud his company. The details of that scheme apparently involved his signing false documents on the official records of his company, causing the company to disburse to him more than he was entitled to. In addition, the CBS fraud involved Corey's knowledge of the company's computer system. There was simply no doubt about the existence of the CBS fraud or about Corey's knowledge of and intentional involvement in it, since he admitted both. At Hartz Mountain, the evidence also showed that Corey designed a scheme to defraud his company. The details of the scheme involved his signing false documents on the official records of his company causing the company to disburse more money than it was required to. In addition, the fraud involved Corey's knowledge of the computer system of the company, since it was his juggling of the computer software inventory that allowed him to accomplish the continuing fraud for more than ten years. Again, there was simply no doubt that the fraudulent scheme existed—the fact and amount of overpayment were detailed in the documentary evidence, were not disputed by Corey himself, and were conceded by his attorney in summation. (Tr. 592). Particularly since this Court has noted in the context of a fraud case that where the prior conduct is introduced to negative a claim of innocent participation or lack of knowledge, the Court

* As the Court has remarked, "Evidence need not prove the Government's case before it can be introduced." *United States v. Fisher*, 455 F.2d 1101, 1103 (2d Cir. 1972).

"need not require that the [similar act] be identical in purport or made under precisely like circumstances," *United States v. Birrell*, 447 F.2d 468, 1172 (2d Cir. 1971), the CBS scheme was clearly of remarkable similarity to the Hartz fraud.

The only difference between the two noted by the panel is that at CBS Corey falsified "his own" records, whereas at Hartz Mountain he arranged to have the excess paid to "third parties" who then kicked back a portion to him. This precise distinction, however, has already been found by the Court to be a distinction without a difference. In *United States v. Kaufman*, 483 F.2d 806 (2d Cir. 1971), upon which we relied in our original brief to support the similarity of the CBS conduct, Brief at 12, the defendant was convicted of violating the Soldiers' and Sailors' Civil Relief Act. In particular, Kaufman was accused of knowingly signing affidavits stating that he had spoken with certain individuals upon whom process had been served in order to determine that they were not in the military service. Kaufman conceded at trial that the facts stated in the affidavit were untrue; rather, he contended that the affidavits had been proposed by subordinates, and signed by him without knowledge of their falsity or intent to mislead. On cross-examination he was questioned about his prior income tax returns, and admitted that he had made a false statement on his personal income tax return. This Court held that the cross-examination was proper:

"Evidence that the defendant had signed false legal documents relating to *his own personal affairs* was relevant to rebut his testimony in which he characterized himself as an unwitting employee beguiled by his superiors into unknowingly signing false affidavits. [Citations omitted.] In this case, tax fraud constituted a similar act. The basic element of both consisted of signing documents knowing them to contain false statements."

In short, Kaufman's claim was almost precisely parallel to that of Corey, and the panel's resolution of the claim is glaringly inconsistent with the *Kaufman* opinion. In *Kaufman*, the Court not only endorsed as a similar act prior activity relating to personal affairs as tending to show knowledge with respect to documents prepared by others, but did so in the context of facts considerably less similar than the almost complete parallel presented in this case. Here, the similarity extended not only to the falsity of the statements, but also to the relationship with the employer; the use of false documents for monetary gain; and knowledge of computer systems. See also *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (signing of false affidavit admissible in income tax prosecution); *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) (usurious behavior admissible in extortion case); *United States v. Boatner*, 478 F.2d 737, 742 (2d Cir. 1973) (evidence of passing counterfeit bills admissible to show knowledge in a case charging use of stolen credit cards).

In addition, not only is the panel's indication of error inconsistent with the precise—and, we submit, controlling—precedent of *Kaufman* and the other cited cases, but it ignores the governing rationale of the similar act decisions. As the Court has noted on several occasions, that rationale is grounded upon

“the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.”

2 Wigmore, *Evidence* § 302, quoted in *United States v. Robbins*, 340 F.2d 684, 688 (2d Cir. 1965); *United States v. Klein*, 340 F.2d 547, 549 (2d Cir. 1965). The “chance” that Corey innocently participated in a decade-long scheme to defraud Hartz Mountain by unknowingly

signing innumerable fraudulent documents was measurably reduced by the admitted fact that five years earlier * he had signed—with self-confessed knowledge and fraudulent intent—untrue documents submitted to his prior employer.

Finally, the panel does not dispute but nonetheless ignores the breadth of the trial court's discretion as well as the numerous significant facts underlying the proper exercise of that discretion in this case. As the entire Court has recently noted, a trial court's exercise of discretion under Rule 403 will be reviewed only if the action is "arbitrary" or "irrational." *United States v. Robinson*, *supra*, 560 F.2d at 515. Indeed, the Court has previously noted the deference with which determinations concerning similar acts will be accorded on appeal. See, e.g., *United States v. Leonard*, *supra*, 524 F.2d at 1092; *United States v. Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977). Judge Motley's decision to admit the evidence surely fell well within this wide ambit. The probative value of the evidence was substantial, as the *Kaufman* precedent,

* While the panel properly considers the age of the similar act, its conclusion of a large "remoteness of time," slip op. at 589, is exaggerated. As a logical matter, the critical time period is that between the similar act and the conduct under scrutiny at trial, see *United States v. Robbins*, *supra*, 340 F.2d at 688. The fact that a sixteen year gap occurred between the CBS incident and trial is simply irrelevant, at least where the prior conduct was straightforwardly admitted. While the five year gap is not *de minimis*, it is a fraction of the period of time between similar acts countenanced by this Circuit, *United States v. Magnano*, *supra*, 543 F.2d at 935 (13 years), and the closeness of the conduct was emphasized by the fact that Corey's firing at CBS led directly to his move to Hartz Mountain.

The panel's reliance of F.R.Evid. 609(b) is thus largely irrelevant, since the critical time period in question of *impeachment* is the time between the impeaching act and the testimony of the witness at trial. At any rate, this Court's decisions under Rule 609 underscore the limited review of a trial court's ruling. *United States v. Hawley*, 554 F.2d 50, 52 (2d Cir. 1977); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). See *United States v. Robinson*, *supra*, 560 F.2d at 515, n.10.

among others, emphasizes. Most importantly, the ruling was made after the defendant had testified, in precise accord with this Court's admonition that such issues should be resolved "after the presentation of the defendant's case when there [is] a better opportunity to appraise the prosecution's need for it." *United States v. Leonard*, *supra*, 524 F.2d at 1092; *United States v. Kaufman*, *supra*, 453 F.2d at 311. During the defendant's case, the "prosecution's need" for the evidence became overwhelmingly obvious when Corey meticulously isolated his knowledge and intent as the only disputed issues of fact before the jury, and claimed that his ten years of signing false documents had been an innocent mistake. (Tr. 388-89).^{*} The similar act evidence was not inherently inflammatory; far from being "the equivalent of a bloody shirt, . . . a dying accusation of poisoning, . . . or a claim of homosexuality," *United States v. Leonard*, *supra*, 524 F.2d at 1091-92 (citations omitted), it related solely to Corey's efforts to cheat his employer and to avoid the payment of taxes—hardly matters that would cast him in an unusually unsympathetic light or induce the jurors to convict him without regard to the evidence. Compare *United States v. Robinson*, *supra*, 560 F.2d at 514 (possession of a gun not overly prejudicial). Finally, the matter *did* not involve a "trial within a trial," *United States v. Mallah*, 503 F.2d 971, 976-77 (2d Cir. 1974), or even the presentation of any independent evidence, but rather entailed only two pages of cross-examination by the prosecutor. In short, the "danger of unfair prejudice [or] confusion" was non-existent, nor

^{*} The significance of the timing and context of the similar act evidence is totally overlooked by the panel. In contrast, not only did the Court in *Leonard* and *Kaufman* emphasize the procedure followed here as the preferable one, but in the only decision in recent years reversing a conviction because of the improper admission of similar act evidence, *United States v. DeCicco*, 435 F.2d 478 (2d Cir. 1970), the Court specifically noted that the issues of knowledge and intent had not been raised at all by the defendants, who did not testify and relied solely on the claim that the events asserted in the Government's case did not happen at all.

is any even asserted in the opinion. Particularly since Judge Motley gave the issue careful deliberation, for this Court to indicate, in essence, that her action was "arbitrary" and "irrational" is to disregard both the record and precedent.

To conclude, we recognize that similar act proof may under certain circumstances be subject to abuse. While we are appreciative of the Court's concern in that regard, we submit that this case was an entirely inappropriate one in which to voice it. The similarity of the conduct, as emphasized to the trier of fact by the Court's *Kaufman* opinion;* the brevity of the trial time expended on the matter; the clarity ~~upon~~^{upon} which the trial focused upon Corey's knowledge and intent; and the innocuous nature of the similar act all made Judge Motley's action an entirely proper exercise of discretion. For this Court even to "assume" that this was "error" would create unfortunate, unfounded, and wholly new precedent. We respectfully urge the Court to modify the opinion to indicate that Judge Motley's ruling was not error.

CONCLUSION

The opinion should be modified as indicated herein.

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* The *Kaufman* decision was specifically brought to Judge Motley's attention in a trial memorandum, at p. 3, submitted prior to her ruling.

